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No. 91-1355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

J. ARON & COMPANY,

Petitioner,

v.

LEO HAVILAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF SECURITIES INDUSTRY ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF J. ARON & COMPANY AND BRIEF OF *AMICUS CURIAE*

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MOTION OF SECURITIES INDUSTRY ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF J. ARON & COMPANY

The Securities Industry Association ("SIA") moves pursuant to Rule 37 of the Rules of this Court for leave to file the brief annexed hereto as *amicus curiae* in support of the petition for a writ of certiorari of J. Aron & Company. Petitioner has consented to the filing of such brief, but respondent has refused to do so.

SIA is a trade association of more than 600 securities firms of all sizes and types. Its members account for approximately 90 percent of the securities business conducted in North America and include all of the major securities firms in New York City. In the past, SIA has submitted an *amicus* brief to this Court when, as here, a case presents an issue of national importance to our industry.

SIA has a substantial interest in the issues relating to the arbitrability of employment-related claims by registered representatives of the New York Stock Exchange ("NYSE"). Many of SIA's members are members of the NYSE, and those SIA members have historically relied upon arbitrations conducted by the NYSE to resolve employment-related disputes with their thousands of employees who have registered with the NYSE as securities representatives.

As a result of the decision of the United States Court of Appeals for the Second Circuit below, registered representatives of NYSE member firms who do not formally participate in securities trading on the NYSE will be able to circumvent their commitment to arbitrate employment-related claims by bringing suit in federal or state court against the non-member affiliates of their employers, even if those same claims against their employers must be arbitrated.

Unless corrected by this Court, SIA fears that the Second Circuit's decision will (i) disrupt the expectations of NYSE member firms and their employees with respect to the arbitrability of employment-related claims, (ii) increase the costs to the securities industry of resolving such claims, and (iii) raise the burden imposed on federal and state courts in connection with claims that historically have been resolved by highly respected NYSE arbitration procedures.

For the reasons stated herein, SIA respectfully prays that the Court grant this motion to file its *amicus* brief annexed hereto.

Respectfully submitted,

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BRIEF OF SECURITIES INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF J. ARON & COMPANY

The Securities Industry Association ("SIA") submits this brief as *amicus curiae* in support of the petition of J. Aron & Company and on an issue of substantial national importance to the securities industry: Whether the Federal Arbitration Act permits a New York Stock Exchange ("NYSE") registered representative to avoid his commitment to arbitrate employment-related claims against his employer by asserting those claims against an affiliate of his employer that is not a member of the NYSE?

Statement

Because the nation's securities industry is centered in New York City, decisions of the United States Court of Appeals for the Second Circuit have widespread ramifications for the industry. We submit this brief to urge review and reversal of the October 16, 1991 decision of a divided panel of the Second Circuit, which permitted respondent, a former vice president of an NYSE member firm, to circumvent his agreement to arbitrate employment-related disputes by bringing suit against the firm's non-member affiliate, even though the same dispute against the member firm was indisputably subject to NYSE arbitration.

NYSE Rule 600(a) requires arbitration of any dispute between an "associated person"[1] and a non-NYSE member "in connection with [the associated person's] activities as an associated person." As interpreted by the Second Circuit, Rule 600(a) does not cover employment-related disputes between employees of NYSE members and non-member affiliates of their employers, unless the employees actually participate in securities trading on the NYSE. *Haviland v. Goldman, Sachs & Co.*, 947 F.2d 601, 602, 605-07 (2d Cir. 1991) (A4, A11-A16).[2] Thus, in the Second Circuit, NYSE registered representatives who do not actually trade securities on the NYSE may now avoid their contractual obligation to arbitrate employment-related claims against their employers simply by asserting those claims in federal or state court against the non-member affiliates of their employers.

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[1] An "associated person" includes "an officer, director, branch manager or employee of a broker or dealer that is a member." *Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047, 1054 (2d Cir. 1989).

[2] Citations in the form "A__" are to the appendix to J. Aron & Company's petition.

Summary of Argument

The Second Circuit's decision is contrary to the express language of NYSE Rule 600(a), the strong federal policy favoring arbitration repeatedly enunciated by this Court,[3] and the decisions of the other courts of appeals.[4] Unless corrected by this Court, we fear that the Second Circuit's decision will (i) upset the settled expectations of NYSE member firms and their employees with respect to the arbitrability of employment-related claims, (ii) increase the costs to the industry of resolving such claims, and (iii) substantially increase the burden on federal and state courts with respect to claims that until now have been the subject of highly respected NYSE arbitration procedures.

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[3] *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1654 (1991); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

[4] As Judge Walker argued below, 947 F.2d at 609 (Walker, J., dissenting) (A20), the Second Circuit's narrow interpretation of Rule 600(a) squarely conflicts with that of the D.C. Circuit. *See Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826, 830-31 (D.C. Cir. 1987). In addition, other circuits have expressly held that the strong federal policy favoring arbitration requires that NYSE rules be construed literally and that any uncertainty or ambiguity be resolved in favor of arbitration. *See McGinnis v. E.F. Hutton & Co.*, 812 F.2d 1011, 1013 (6th Cir.), *cert. denied*, 484 U.S. 824 (1987); *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449 (9th Cir. 1987); *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 937-38 (3d Cir. 1985); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163, 1165 (8th Cir. 1984). The Second Circuit failed to follow the plain language of Rule 600(a), *see* 947 F.2d at 611 (Walker, J., dissenting) (A17), and, in any event, did not follow the law of the other circuits that any uncertainty or ambiguity be resolved in favor of arbitration. *See, e.g., Zolezzi*, 789 F.2d at 1450-51; *Morgan*, 729 F.2d at 1167.

Argument

The facts and applicable law are fully stated in J. Aron's petition and will not be recanvassed here. We wish only to emphasize the national importance to the securities industry of the issue raised by this petition and to direct this Court's attention to the following points.

1. For many years, employment-related disputes in the securities industry have been the subject of NYSE arbitration. The Second Circuit's decision has upset the settled expectations of NYSE members and their employees with respect to the arbitrability of such claims. Prior to the Second Circuit's decision, NYSE Rule 600(a) was widely understood in the securities industry to require registered representatives of NYSE member firms to arbitrate employment-related disputes against the non-member affiliates of those firms.

2. Because more than fifty NYSE members, including all of the major firms, have non-member affiliates (*see* A42-A43), we fear that the Second Circuit's decision will result in many instances in which employees of NYSE member firms seek to avoid NYSE arbitration by bringing employment-related claims in federal or state court against the non-member affiliates of their employers, even though the same claims against member firms must be arbitrated. We believe that this shift of cases from NYSE arbitration to federal and state courts will substantially increase the litigation costs borne by member firms without resulting in the more just resolution of employees' claims. Indeed, it is possible that the high cost of litigation in court — as compared to arbitration — might force firms to settle unmeritorious claims.

3. The securities industry is highly specialized, and arbitrators are particularly suited to decide the complicated issues that can arise out of employment disputes in the industry. As Judge Walker emphasized in his dissent below, NYSE "arbitrators would be well-qualified to resolve

Haviland's dispute with J. Aron and the issues of responsibilities to clients, information exchanges in the energy futures and options markets, and the employment conditions imposed by J. Aron's [alleged] co-conspirator Goldman." 947 F.2d at 611 (A25). This observation is likely to be equally true with respect to almost any employment-related claim brought against an NYSE member firm.

4. The highly respected NYSE arbitration procedures protect the interests of both employers and employees in the securities industry. Thus, in rejecting the claim that NYSE arbitration was somehow unfair, this Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1654-55 (1991), emphasized that NYSE arbitration rules "protect[] against biased panels," provide for generous discovery and require arbitrators to issue written decisions.

5. NYSE arbitrators resolve many employment-related claims in the securities industry every year. We are concerned that the Second Circuit's decision will result in a substantial—and completely unnecessary—increase in the caseload of federal and state courts as employees increasingly engage in forum shopping. We believe that scarce judicial resources should not be wasted in this manner. The Second Circuit's decision may also result in the uneconomical situation of an NYSE member firm being required to defend itself in arbitration, while its non-member affiliate must defend against the same claim in federal or state court.

Conclusion

For the reasons stated in the petition and herein, SIA urges that *certiorari* be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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